91-1302

No. 91-1122

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,
Debtors,

ANN MOSTOLLER, TRUSTEE,
Cross-Respondent,

vs.

PATRICK F. MESSING,
Cross-Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

GEORGE FREEMAN LEGG
Counsel of Record
BECKY HURD HALSEY
STONE & HINDS, P.C.
Attorneys for Cross-Petitioner
700 First American Center
507 Gay Street, S.W.
Knoxville, Tennessee 37902
(615) 546-6321

1611
Lutz Appellate Printers, Inc. • NJ (908) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTION PRESENTED FOR REVIEW

Whether the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, establishes an exemption under federal law available to the debtor under 11 U.S.C. § 522(b)(2)(A) of the Bankruptcy Code?

LIST OF PARTIES

The cross-petitioner in this action is Patrick F. Messing, debtor. The cross-respondent is Ann Mostoller, Trustee.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions, Statutes and Rule Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. Division Among Various Courts	6
II. The exemption issue affects thousands of debtors and creditors and significantly affects the administration of the Bankruptcy Code.	10
III. Congress intended to include ERISA-qualified pension benefits as property of the estate under 11 U.S.C. § 541(c)(2) and to permit exemption of such benefits under 11 U.S.C. § 522(b).	11
Conclusion	13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

General Motors Corporation v. Buha, 623 F.2d 455 (6th Cir. 1980) 12

Gladwell v. Harline, No. 50-4157, 1991 U.S. App. Lexis 28540 (10th Cir. Dec. 1991) 5

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990) 12

In re Burns, 108 B.R. 308 (Bankr. W.D. Okla. 1989) 7

In re Daniel, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) 6

In re Felts, 114 B.R. 131 (Bankr. W.D. Tex. 1990)..... 7

In re Graham, 726 F.2d 1268 (8th Cir. 1984) 6

In re Hinshaw, 23 B.R. 233 (Bankr. D. Kan. 1982) 7

In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989) ..7, 8, 9

In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985) 6

In re Lucas, 924 F.2d 597 (6th Cir. 1991) 4, 5

In re Martinez, 107 B.R. 378 (Bkrtcy. S.D. Fla. 1989) 7

Contents

Page

In re Messing, 114 B.R. 541 (Bankr. E.D. Tenn. 1990) 3, 4, 7

In re Suarez, 127 B.R. 73 (Bkrtcy. S.D. Fla. 1991) 7

In re Turpin, 644 F.2d 472 (5th Cir. 1981) 6

Mackey v. Lanier Collections Agency & Services, Inc., 486 U.S. 825 (1988) 11

Matter of Goff, 706 F.2d 574 (5th Cir. 1983) 6, 7, 8, 9

Reed v. Drummond (In re Reed), No. 90-15874, 1991 U.S. App. Lexis 28739 (9th Cir. Dec. 1991) 5, 6

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 8

Velis v. Kardonis, No. 91-5084, 1991 U.S. App. Lexis 26809 (3rd Cir. Nov. 1991)..... 5

Statutes Cited:

11 U.S.C, § 522(b)(1) 11

11 U.S.C. § 522(b)(2)(A) .....i, 2, 3, 4, 5, 6, 9, 10, 11

11 U.S.C. § 522(d)(10)(E)..... 11

11 U.S.C. § 541(c)(1)(2).....2, 4, 5, 6, 9, 11

26 U.S.C. § 401(a)(13) 2, 12

Contents

Page

28 U.S.C. § 1254(1) 2

29 U.S.C. § 206(d) 4

29 U.S.C. § 1001 et seq. .....i, 10

29 U.S.C. § 1056(d) 2, 4, 6, 10

29 U.S.C. § 1202(c) 12

Other Authority Cited:

26 C.F.R. § 1.401(a)-13..... 2

APPENDIX

Appendix A — Relevant Statutes 1a

No. 91-1122

In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

Debtors,

ANN MOSTOLLER, TRUSTEE,

Cross-Respondent,

vs.

PATRICK F. MESSING,

Cross-Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

The cross-petitioner, Patrick F. Messing, debtor, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the opinion and order

of that court entered on August 22, 1991, as amended by the opinion and order entered on September 24, 1991.

OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the Eastern District of Tennessee is reported at 114 B.R. 541 (Bankr. E.D. Tenn. 1990). The opinion of the United States District Court for the Eastern District of Tennessee and the opinion of the United States Court of Appeals for the Sixth Circuit are not reported. The reports of opinions are reprinted in the original petition for writ of certiorari filed by Ann Mostoller, Trustee, and are thus not reprinted herein pursuant to Sup. Ct. R. 12.3.

STATEMENT OF JURISDICTION

The opinion of the Sixth Circuit was filed on September 24, 1991. A petition for rehearing and suggestion for rehearing *en banc* was denied by an order filed October 10, 1991. The Cross-respondent, Ann Mostoller, Trustee, filed an original petition for a writ of certiorari in this Court on January 8, 1992, and the original petition was served upon and received by cross-petitioner on January 10, 1992. This cross-petition is filed pursuant to Sup. Ct. R. 12.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

Pursuant to Sup. Ct. R. 14.1(f), the following statutes cited herein are set forth in Appendix A at pages 1a-4a.

11 U.S.C. § 522(b)(2)(A); 11 U.S.C. § 541(c)(1)(2); 26 U.S.C. § 401(a)(13); 26 C.F.R. § 1.401(a)-13; and 29 U.S.C. § 1056(d).

STATEMENT OF THE CASE

The debtor filed a petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Tennessee on July 12, 1989. In the bankruptcy proceeding, the debtor claimed as an exemption his interest in an ERISA-qualified pension plan in the amount of six thousand three hundred sixty-five dollars and forty-five cents ($6,365.45).

The debtor asserted that ERISA and Internal Revenue Code § 401(a)(13) established an exemption under "Federal law" which was available to him in bankruptcy pursuant to 11 U.S.C. § 522(b)(2)(A). *In re Messing,* 114 B.R. 541, 545 (Bankr. E.D. Tenn. 1990).

The Trustee objected to the debtor's exemption on the ground that ERISA did not provide an exemption under nonbankruptcy federal law. *Id.* at 542. The issues having been joined in an adversary proceeding, the parties stipulated the following pertinent facts:

> 1. The debtor is a beneficiary of a pension benefit plan (Plan) established by his employer under § 401(k) of the Internal Revenue Code (IRC) (26 U.S.C.A. § 401(k) (West Supp. 1990)).
>
> 2. The Plan is an ERISA-qualified plan, qualifying under IRC § 401(a) (26 U.S.C.A. § 401(a) (West Supp. 1990)).
>
> 3. The Plan contains the anti-assignment and anti-alienation provisions required by ERISA § 206(d) (29 U.S.C.A. § 1056(d) (West Supp. 1990)) and IRC § 401(a)(13) (26 U.S.C.A. § 401(a)(13) (West Supp. 1990)).

> 4. The debtor's interest in the Plan on July 12, 1989, the date he and his wife filed their joint petition under Chapter 7, was $6,365.45.
>
> 5. On the date his bankruptcy petition was filed, the debtor was thirty-one years old, employed by J.B.F. Associates, Inc., was not receiving benefits under the Plan, and had never made or received any withdrawals or distribution from the Plan.

In re Messing, 114 B.R. 541, 542.

The bankruptcy court allowed the exemption, holding that ERISA § 206(d) established a nonbankruptcy federal exemption available to the debtor under Bankruptcy Code § 522(b)(2)(A). *Id.* at 550. The Trustee appealed to the district court and the district court reversed the judgment of the bankruptcy court, holding that the debtor was not entitled to claim an exemption pursuant to 11 U.S.C. § 522(b)(2)(A), in the proceeds of his ERISA-qualified pension benefit plan.

The debtor appealed the decision of the district court denying the claim of exemption to the Sixth Circuit. During the pendency of the appeal, the Sixth Circuit filed its opinion in the case of *In re Lucas*, 924 F.2d 597 (6th Cir. 1991), holding that a debtor's ERISA-qualified pension benefits were excluded from the debtor's estate pursuant to 11 U.S.C. § 541(c)(2) and 29 U.S.C. § 1056(d). The debtor raised two contentions on appeal. The first was that the Sixth Circuit's opinion in *In re Lucas*, was dispositive of the appeal because property excluded from the estate is not subject to the jurisdictional reach of the bankruptcy trustee. In the alternative, the debtor suggested that even if ERISA benefits were properly considered part of the debtor's estate, the pension benefits were exempt from a trustee's reach under § 1056(d) of ERISA

and § 522(b)(2)(A) of the Bankruptcy Code.

The Sixth Circuit held that the decision in *In re Lucas* was dispositive of the appeal and thus, pretermitted the issue of whether ERISA provided an exemption of pension benefits from a debtor's estate.

REASONS FOR GRANTING THE WRIT

The original petition for writ of certiorari filed by the Trustee seeks review of the issue of whether ERISA-qualified pension benefits may be excluded from a bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). The principal reason asserted by the Trustee for seeking review of the exclusion issue was the split, at that time, of authority between the Fifth, Eighth, Ninth and Eleventh Circuits, which have held that ERISA-qualified pension benefits are included in a debtor's estate, and the Fourth and Sixth Circuits, which have held that such benefits are excluded from the estate because of the "plain meaning" of 11 U.S.C. § 541(c)(2).

Since the filing of the original petition, the Third and Tenth Circuits have filed opinions in the cases of *Velis v. Kardonis,* No. 91-5084, 1991 U.S. App. Lexis 26809 (3rd Cir. Nov. 1991) and *Gladwell v. Harline,* No. 90-4157, 1991 U.S. App. Lexis 28540 (10th Cir. 1991), consistent with those of the Fourth and Sixth Circuits. Moreover, the Ninth Circuit recently affirmed its prior decision rejecting the exclusion argument. *Reed v. Drummond (In re Reed),* No. 90-15874,1991 U.S. App. Lexis 28739 (9th Cir. Dec. 1991). The circuit courts of appeals are now evenly divided on the exclusion issue, and, assuming this Court grants review of the original petition, the debtor maintains that a full and final resolution of a debtor's right to ERISA-qualified pension benefits cannot be concluded without consideration of the issue of exemption of pension benefits under 11 U.S.C. § 522(b)(2)(A).

As argued in the debtor's brief in opposition to a petition

for a writ of certiorari, the debtor maintains that the Court should construe 29 U.S.C. § 1056(d) and 11 U.S.C. § 541(c)(2) harmoniously to exclude ERISA *pension* benefit plans from bankruptcy estates and, on this ground, affirm the decision of the Sixth Circuit. However, if the Court concludes that ERISA benefit plans are determined to be included in property of the bankruptcy estate, then the debtor insists that he should be allowed to exempt his ERISA pension benefits under 11 U.S.C. § 522 (b)(2)(A).

I.

DIVISION AMONG VARIOUS COURTS

Numerous courts have considered the application of 11 U.S.C. § 522(b)(2)(A) and the Fifth, Eighth, Ninth and Eleventh Circuit Courts of Appeals have concluded that the anti-alienation and anti-assignment language of ERISA does not create a bankruptcy federal exemption. *In re Daniel,* 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied.* 475 U.S. 1016 (1986); *In re Lichstrahl,* 750 F.2d 1488, 1491 (11th Cir. 1985); *In re Graham,* 726 F.2d 1268, 1274 (8th Cir. 1984); *Matter of Goff,* 706 F.2d 574, 585 (5th Cir. 1983) and *In re Turpin,* 644 F.2d 472, 474 n.1 (5th Cir. 1981) (dicta). Recently, the Ninth Circuit reaffirmed its rejection of the exemption issue in *Reed v. Drummond* (*In re Reed*), No. 90-15874, 1991 U.S. App. Lexis 28739 (9th Cir. Dec. 1991). In addition, the vast majority of bankruptcy courts have concluded that ERISA does not provide an exemption under federal law.

The courts rejecting the exemption argument have looked to the legislative history and the commentary accommpanying Bankruptcy Code § 522(b)(2)(A) and noted that ERISA was not included in a list of other nonbankruptcy federal exemptions. These courts have held that the omission was indicative of congressional intent that ERISA did not establish an exemption for bankruptcy

purposes under federal law. The cornerstone for this proposition was the dicta found in *In re Goff*, 706 F.2d 574, 585 (5th Cir. 1983).

However, the Bankruptcy Court in this case, consistent with compelling logic and the trend of authority, concluded that the ". . . clear language of § 522(b)(2)(A) belies such an interpretation." *In re Messing*, 114 B.R. 541, 547 (Bankr. E.D. Tenn. 1990). *See also, In re Hinshaw*, 23 B.R. 233 (Bankr. D. Kan. 1982); *In re Burns*, 108 B.R. 308 (Bankr. W.D. Okla. 1989) *(en banc); In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989), discussed at p. 15 *infra; In re Felts*, 114 B.R. 131 (Bankr. W.D. Tex. 1990); *In re Martinez*, 107 B.R. 378 (Bkrtcy. S.D. Fla. 1989) and *In re Suarez*, 127 B.R. 73 (Bkrtcy. S.D. Fla. 1991).

The leading case expressing the minority view is *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989) wherein the court pointed out that the Fifth Circuit broke a cardinal rule of statutory construction when it relied heavily on the illustrative list and the legislative history to support this conclusion that Congress did not intend to include ERISA plans under the federal law exemption. The court explained:

> Where the meaning of a statute is clear on its face, however, it is improper to resort to legislative history to interpret the statute. . .*Goff* concedes that § 522(b)(2)(A)'s legislative history is sparse and that it provides "no further insight into which other, if any, federal laws were intended to be brought within this provision." As *Goff's* interpretation derives from its heavy reliance on the illustrative list in the legislative hsitory, its logic must be rejected in the face of the statute, which is clear and unambiguous on its face. . .[I]f resort is to be made to the legislative history, then

> interpretation of that history must be disciplined. It is a non sequitur to say that the failure to include something on an illustrative list is probative of an intent to exclude it from that list. Illustrative lists (in contrast to exhaustive lists) by their nature preclude the possibility of overlooking" a statute of the type already listed. *Goff* doubted that Congress meant to include ERISA when other "significantly less comprehensive and less well-known statutes" were included in the list but that observation simply misses the point. The statute has long adopted an attitude of neutrality toward the nature and extent of a given exemption leaving that issue to be controlled by the statute which confers exemption and the case law which construes it. . . .Against this backdrop, the legislative history cannot be read to be anything more than what it purports to be — an "illustrative" list which merely indicates what might qualify for exemption under § 522(b)(2)(A). It is up to the courts to determine whether a given statute confers an exemption without resort to bankruptcy law, much less resort to its legislative history.

In re Komet, 104 B.R. at 814-815. The Supreme Court has taken the same approach in cases under the Bankruptcy Code ". . .for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

While conceding that the Bankruptcy Code was generally intended to broaden the definition of "property of the estate," the court in *Komet*, rejected the conclusion in *Goff*, that Congress intended to limit an exemption of pension funds. Bankruptcy Code

§§ 541 and 522 serve two (2) very distinct purposes as pointed out in *In re Komet*:

> In giving debtors a choice of exemption schemes ("existing" or "generic"), Congress certainly did not intend to put debtors to a Hobson's choice. The generic exemptions alternative represents a complete, free-standing exemption scheme, which provides not only for such things as cars, clothes and homestead (otherwise governed by state exemption law) but also for retirement benefits. . . .After all, debtors who might chose the generic exemptions must forego the existing exemptions, including those to retirement benefits available under "other federal law." Debtors should not be penalized for making bad choice nor does anything in the statute or the legislative history suggest otherwise.

In re Komet, 104 B.R. at 812-813.

Finally, the court in *Komet* rejected the conclusion in *Goff*, that the Bankruptcy Code overruled ERISA.

> The proper analysis is to determine whether the two statutes can be construed so as to avoid any conflict, and if such a way cannot be found, then decide upon a resolution which would do the most to serve the Congressional intent "be impressed in both statutes and will least undercut the intent as expressed in either one."

In re Komet, 104 B.R. at 815.

Thus, if a debtor chooses the existing exemption scheme under

Bankruptcy Code § 522(b)(2)(A) rather than the generic exemption scheme as set forth in Bankruptcy Code § 522(d), such a debtor has a right to claim his pension assets as exempt property under "other federal law," such as ERISA's anti-alienation provision found in 11 U.S.C. § 1056(d).

II.

THE EXEMPTION ISSUE AFFECTS THOUSANDS OF DEBTORS AND CREDITORS AND SIGNIFICANTLY AFFECTS THE ADMINISTRATION OF THE BANKRUPTCY CODE.

The same argument advanced by the petitioner in her original petition regarding the number of bankruptcy filings and the amount of contributions to pension plans apply with the same force here. Furthermore, debtors should not be denied exemption of ERISA-qualified pension benefits in one district, but allowed to exempt the same benefits in another. Such a result is contrary to the congressional objective of providing a uniform system of bankruptcy laws, P.L. 95-598, 95 Stat. 2549, and of protecting the "continued well-being and security of millions of employees and their dependents . . . . " 29 U.S.C § 1001.

III.

CONGRESS INTENDED TO INCLUDE ERISA-QUALIFIED PENSION BENEFITS AS PROPERTY OF THE ESTATE UNDER 11 U.S.C. § 541(c)(2) AND TO PERMIT EXEMPTION OF SUCH BENEFITS UNDER 11 U.S.C. § 522(b).

The Trustee has cogently argued that through the broad sweep of § 541, Congress intended to include ERISA-qualified pension benefits within the definition of property of the estate. The Trustee points to 11 U.S.C. § 522(d)(10)(E), the ERISA-qualified pension benefit exemption under the federal list of exemptions for states which have not opted to use state law, and concludes that Congress intended to deal with ERISA as a matter of exemption.

Using these same arguments, your cross-petitioner submits that Congress also intended and expressly provided that citizens of states which have opted out of the federal list of exemptions pursuant to 11 U.S.C. § 522(b)(1) are entitled to claim not only state law exemptions, but also exemptions under nonbankruptcy, federal law. Bankruptcy Code, § 522(b)(2)(A) provides:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate . . . (2)(A) Any property that is exempt under Federal law, other than subsection (d) of this section, or state or local law . . . .

The only remaining question is whether ERISA is such a federal law providing an exemption for qualified pension benefits.

Recently, this Court in the case of *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 829-831 (1988), observed that ERISA barred the alienation or assignment of

pension benefits and thus in effect exempted ERISA benefits from state enforcement mechanisms to prevent those benefits from being paid to plan participants. That ERISA provides a federal law exemption is also implicit in *Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 365 (1990), where this Court said:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief from the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Id. at 372. The Court refused to impose a constructive trust upon, and prohibited execution by garnishment of funds in an ERISA-qualified pension plan. *Id.* at 376.

Additionally, the Secretary of the Treasury pursuant to 29 U.S.C. § 1202(c), issued Internal Revenue Service Regulation § 1.401(a)-13, providing that ERISA-qualified pension benefits " . . . may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. § 1.401(a)-13 (1979). This regulation has been held to be legislative rather than interpretive and should be controlling authority. *General Motors Corporation v. Buha,* 623 F.2d 455, 459-463 (6th Cir. 1980). The Sixth Circuit concluded in the *General Motors* case that pension plan benefits were not subject to garnishment. *Id.* at 463.

Since ERISA-qualified pension plan benefits have been protected or exempted from the reach of creditors in cases involving voluntary or involuntary transfers, congressional intent and logic compel the conclusion that ERISA provides a federal

law exemption for pension benefits which may be exempted from the reach of a bankruptcy trustee.

CONCLUSION

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE FREEMAN LEGG
Counsel of Record
BECKY HURD HALSEY
STONE & HINDS, P.C.
Attorneys for Cross-Petitioner
700 First American Center
507 Gay Street, S.W.
Knoxville, Tennessee 37902
(615) 546-6321

APPENDIX A — RELEVANT STATUTES

11 U.S.C § 522(b)(2)(A):

§ 522. Exemptions

* * *

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either —

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; . . .

11 U.S.C. § 541(c)(1)(2):

§ 541. Property of the estate

* * *

(1) Except as provided in paragraph (2) of this

subsection, an interest of the debtor in property becomes property of the estate . . .

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

26 C.F.R. § 1.401(a)-13:

§ 1.401. Assignment or alienation of benefits.

(b) *No assignment or alienation—(1) General rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, *assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.* (emphasis added)

26 U.S.C. § 401(a)(13)

§ 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification.— A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

Appendix A

(13) Assignment and alienation.—

(A) In general.— A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders.— Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

Appendix A

29 U.S.C. § 1056(d)(1):

§ 1056. Form and payment of benefits

* * *

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-1302

In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

Debtors

ANN MOSTOLLER, TRUSTEE,

Petitioner,

vs.

PATRICK F. MESSING,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

JOHN F. WEAVER
McCORD, WEAVER & TROUTMAN, P.C.
Suite 1300, Plaza Tower
Post Office Box 2046
Knoxville, TN 37901
615-637-5252

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Summary of Argument 3

Argument 3

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES

Alagna, In re, 107 B.R. 301 (Bankr. D. Colo. 1989) 9

Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990) 6

Daniel v. Security Pacific Nat'l Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) 5, 8, 9, 10

Fogler v. Flindall (In re Flindall), 105 B.R. 32 (Bankr. D. Ariz. 1989) 13

Forbes v. Lucas (In re Lucas), 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991) 2, 6

Gladwell v. Harline (In re Harline), 950 F.2d 608 (10th Cir. 1991) 5

Goff v. Taylor (In re Goff), 706 F.2d 574 (5th Cir. 1983) 5, 10

Graham, In re, 726 F.2d 1268 (8th Cir. 1984) 10

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990) 13

Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967) 4

Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985) 5

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) 13

Martin, In re, 102 B.R. 639 (Bankr. E.D. Tenn. 1989) 13

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) 4

TABLE OF AUTHORITIES – Continued

Page

Patrick v. Burget, 486 U.S. 94 (1988) 4

Samore v. Graham (In re Graham), 726 F.2d 1268 (8th Cir. 1984) 5

Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991), *cert.. granted*, 60 U.S.L.W. 3492 (U.S. Jan. 21, 1992) (No. 91-913) 5

Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991) 5

Youakim v. Miller, 425 U.S. 231 (1976) (per curiam) 4

STATUTES AND COURT RULES

11 U.S.C. § 522(b) 2

11 U.S.C. § 522(b)(2)(A) 2, 3, 5, 6, 7, 9

11 U.S.C. § 522(d)(10)(E) 2, 6, 14

11 U.S.C. § 541 ..... 2, 4

11 U.S.C. § 541(a) 11, 13, 14

11 U.S.C. § 541(c)(2) 2

26 U.S.C. § 401(a)(13) 7, 11

26 U.S.C. § 6110(j)(3) 13

29 U.S.C. § 1056(d)(1) 7, 11

29 U.S.C. § 1144(a) 11, 13

29 U.S.C. § 1144(d) 11, 13

38 U.S.C.S. § 5301(a) (Lawyers Coop. Supp. Feb. 1992) 10

42 U.S.C. § 407 9

TABLE OF AUTHORITIES – Continued

Page

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title I – Protection of Employee Benefit Rights, §§ 1-514, 88 Stat. 832-97 12

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title II – Amendments to the Internal Revenue Code Relating to Retirement Plans, secs. 1001-2007, 88 Stat. 898-994 12

ERISA § 514(a) 12, 13

U.S. Sup. Ct. R. 10.1(a) 3, 6

U.S. Sup. Ct. R. 13.5 3

LEGISLATIVE MATERIALS

H. Rep. No. 595, 95th Cong., 1st Sess. 360 (1977) 8

S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978) 8

OTHER AUTHORITIES

17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4036 (2d ed. 1988) 4

No. 91-1302

In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

Debtors

ANN MOSTOLLER, TRUSTEE,

Petitioner,

vs.

PATRICK F. MESSING,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Comes the Cross-Respondent, Ann Mostoller, Trustee (hereinafter "the Trustee") and respectfully files this Brief in Opposition to the Cross-Petition for a Writ of Certiorari filed herein by the debtor, Patrick F. Messing (hereinafter "the debtor").

STATEMENT OF THE CASE

The Trustee wishes merely to point out that the debtor consistently took the position in the bankruptcy

and district courts that his ERISA-qualified pension interest was *included* in the bankruptcy estate but was exempt. The debtor argued to the Sixth Circuit that its intervening decision in *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991), entitled him to exclude the pension from his bankruptcy estate, but he still argued in the Sixth Circuit that the reasoning of *Lucas* was flawed, and that the pension interest should indeed be considered property of the estate:

> The debtor questions why Congress would have created a bankruptcy law pension plan exemption if pension plans in the first instance were excluded from property of the bankruptcy estate under 11 U.S.C. § 541(c)(2). It would appear that the drafters of 11 U.S.C. § 541 did not intend an exclusion of these benefits due to the fact that federal law allows an exemption under 11 U.S.C. § 522(d)(10)(E). The debtor asserts that an analysis of these statutes supports the better view that ERISA pension plan benefits should be included as property of the estate but exempt under 11 U.S.C. § 522(b)(2)(A).

Reply Brief of Appellants at 6, *Mostoller v. Messing*, No. 91-5087 (6th Cir. dated April 26, 1991).

It should also be noted that in this Court, Respondent asserts, "Congress intended to include ERISA-qualified pension benefits as property of the estate under 11 U.S.C. § 541(c)(2) and to permit exemption of such benefits under 11 U.S.C. § 522(b)." Cross-Petition for a Writ of Certiorari at 11.

SUMMARY OF ARGUMENT

Although both the bankruptcy court and the district court decided this case on the basis of the exemption issue raised by the debtor, the Sixth Circuit refused to rule on the issue in light of its holding that the debtor's pension interest was excluded from the bankruptcy estate. Because the Sixth Circuit failed to rule on the exemption issue, the Trustee respectfully submits that it is not appropriate for resolution at this time. Furthermore, as the debtor tacitly concedes, there is no conflict among the Circuit Courts of Appeal on this issue. *See* U.S. Sup. Ct. Rule 10.1(a).

Nevertheless, the exemption issue was correctly resolved by the district court in this case, which held that there is no nonbankruptcy federal exemption for an ERISA-qualified pension interest under 11 U.S.C. § 522(b)(2)(A). If this Court sees fit to resolve the issue, it should be decided in accordance with the district court's holding.

Finally, pursuant to U.S. Sup. Ct. Rule 13.5, the Cross-Petition should not be granted if the Petition for Certiorari is not granted.

ARGUMENT

I. Because the Sixth Circuit Refused to Rule on the Exemption Issue, Resolution of the Issue is Not Appropriate.

In its opinion, the Sixth Circuit stated, "As we find the debtor is correct in his assertion that *Lucas* is dispositive of this appeal, we do not reach the question of

whether ERISA provides an exemption for pension benefits from a bankrupt's estate." *Mostoller v. Messing*, No. 91-5087, slip op. at 2-3 (6th Cir. Sept. 24, 1991), *reprinted in* Petition for Certiorari at page App. 3. As this Court noted, "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam)). *See generally* 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4036, at 38-39 & n.72 (2d ed. 1988). This is not a case in which the issue pretermitted by the Court of Appeals involves the same analysis as the issue decided by the Court of Appeals, nor is the pretermitted issue so clear that it should be decided in this Court. *Cf. Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 86 n.15 (1981) ("Because the same analysis is applicable to both claims, we address the Title VII question despite the Court of Appeals' decision to avoid consideration of that question on the merits."); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967) ("[T]his point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed that its opinion does not decide it."). *See generally* Wright, Miller & Cooper, *supra*, § 4036, at 39-40 & n.75. The exclusion and exemption issues here involve two entirely different sections of the Bankruptcy Code (sections 541 and 522) and implicate different considerations with respect to ERISA.

II. There Is No Conflict Among the Courts of Appeals on the Exemption Issue.

In his Cross-Petition for Certiorari at 6, the debtor refers to "Division Among Various Courts," but is unable to point to any conflict among the United States Courts of Appeals on the exemption issue. *See* Cross-Petition for Certiorari at 6-7. Indeed, the debtor indicates that *every* Court of Appeals that has considered the exemption issue has decided that ERISA does not create a federal non-bankruptcy exemption available to the debtor under 11 U.S.C. § 522(b)(2)(A). *See id.* at 6. The only courts cited by the debtor as taking a contrary position are bankruptcy courts. *See id.* at 7. This fact is not surprising. The Courts of Appeals that have held that ERISA-qualified pension interests are included in the bankruptcy estate have also held that ERISA does not constitute a federal non-bankruptcy exemption. *See Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352, 1358-61 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488, 1490-92 (11th Cir. 1985); *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1273-74 (8th Cir. 1984); *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 582-86 (5th Cir. 1983). The Courts of Appeals that have held that ERISA-qualified pension interests are excluded from the bankruptcy estate have quite logically refused to address the exemption issue, since property cannot be exempted from the estate unless it first becomes property of the estate. *See Shumate v. Patterson*, 943 F.2d 362, 365-66 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3492 (U.S. Jan. 21, 1992) (No. 91-913). *But cf. Gladwell v. Harline (In re Harline)*, 950 F.2d 608 (10th Cir. 1991) (exemption issue apparently not raised by debtor); *Velis v. Kardanis*, 949 F.2d 78,

83 (3d Cir. 1991) (debtor did not challenge on appeal district court's finding of unavailability of exemption under § 522(d)(10)(E); question of federal nonbankruptcy exemption under § 522(b)(2)(A) not at issue because New Jersey has not opted out of federal exemption scheme); *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990) (in context of turnover action by Trustee against plan administrator, exemption issue apparently not raised); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597, 598-99 (6th Cir.) (debtor claimed exemption under Tennessee law; bankruptcy court holding that exemption not available apparently not challenged on appeal), *cert. denied*, 111 S. Ct. 2275 (1991). Thus, the exemption issue raised by the debtor here has created no conflict in the Courts of Appeals. *See* U.S. Sup. Ct. Rule 10.1(a).

The debtor is correct that, if this Court reverses the Sixth Circuit, the status of his pension will not be completely resolved without a ruiing on the exemption issue. However, the proper forum for that determination is the Sixth Circuit on remand. It may well be that, squarely presented with the exemption issue, the Courts of Appeals that have pretermitted the issue will find themselves in agreement with those which have examined it. In the absence of a conflict among the Circuits, any decision by this Court on the exemption issue might ultimately prove unnecessary. Therefore, the Cross-Petition for Certiorari should be denied.

III. The District Court Correctly Held that ERISA Does Not Establish a Federal Nonbankruptcy Exemption Available to Debtors Under Bankruptcy Code § 522(b)(2)(A).

If this Court does consider the exemption issue, the Trustee submits, the issue should be decided in accordance with the district court's ruling in this case. The district court, reversing the bankruptcy court, held that ERISA does not create a federal nonbankruptcy exemption available to debtors under 11 U.S.C. § 522(b)(2)(A). *Mostoller v. Messing*, No. CIV-3-90-601, mem. op. (E.D. Tenn. Dec. 13, 1990), *reprinted in* Petition for Certiorari at pages App. 7-13.

The exemption issue is whether the debtor's ERISA-qualified pension interest constitutes "property that is exempt under Federal law, other than subsection (d) of this section." 11 U.S.C. § 522(b)(2)(A). The extreme minority view espoused by the debtor in his Cross-Petition holds that the anti-assignment, anti-alienation provisions required by 29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401(a)(13) render ERISA-qualified pension interests "exempt under Federal law." However, the majority and better-reasoned view is that ERISA does not constitute a federal exemption statute.

Courts taking the majority view have focused primarily on two factors. First, because of the vague and ambiguous nature of the term "exempt under Federal law," the courts have looked to the legislative history for evidence of congressional intent. Both the House and Senate Reports contain the following passage in the analysis of § 522:

> [S]ome of the items that may be exempted under other Federal laws include:
> - Foreign Service Retirement and Disability payments, 22 U.S.C. 1104;
> - Social security payments, 42 U.S.C. 407;
> - Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;
> - Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601;
> - Civil service retirement benefits, 5 U.S.C. 729, 2265;
> - Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916;
> - Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(L);
> - Veterans benefits, 45 U.S.C. 352(E);
> - Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101; and
> - Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.

H. Rep. No. 595, 95th Cong., 1st Sess. 360 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6316; S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5861. Courts taking the majority view have quite properly viewed this list as illustrative only and not exhaustive. *See In re Daniel*, 771 F.2d at 1360.

More importantly, however, these courts have noted "a significant, rational, and demonstrated difference between the federal exemptions accorded certain funds identified by Congress under Section 522(b)(2)(A) and ERISA pension plans." *In re Alagna*, 107 B.R. 301, 315 (Bankr. D. Colo. 1989). ERISA pension benefits are unlike other property interests, such as Social Security payments and Veterans' benefits, which Congress has specifically chosen to exclude or exempt from the estate. *In re Daniel*, 771 F.2d at 1360-61; *In re Alagna*, 107 B.R. at 315 n.38. Unlike ERISA, other federal laws, such as the Social Security Act, 42 U.S.C. § 407, expressly exclude Social Security benefits from the estate and expressly preempt other federal laws:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and *none of the moneys* paid or payable or rights existing under this subchapter *shall be subject to* execution, levy, attachment, garnishment, or other legal process, or to *the operation of any bankruptcy or insolvency law*.
>
> (b) *No other provision* of law, enacted before, on, or after April 20, 1983, *may be construed to* limit, *supersede*, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. § 407 (emphasis added).

Also, by way of example, unlike ERISA's anti-alienation provisions discussed above, other federal laws expressly constitute federal nonbankruptcy exemptions.

For instance, the Veterans' Benefits Act, at 38 U.S.C.S. § 5301(a) (Lawyers Coop. Supp. Feb. 1992), provides as follows:

> (a) Payments of benefits due or to become due under any law administered by the Secretary . . . shall be exempt. . . .

ERISA benefits may have a drastic practical difference from federal governmental benefits such as Social Security or Veterans' benefits. The latter are, by their nature, periodic and in small sums determined by governmental formula, or they serve as an indemnification for medical expenses, and they are beyond the recipient's control. On the other hand, ERISA benefits may be received in enormous lump sums and may be wholly within the debtor's control. For instance, but for the Fifth, Eighth and Ninth Circuits, the debtors in *Goff*, *Graham*, and *Daniel* would have taken the sums of $90,000.00, $150,000.00, and $98,000.00, to the prejudice of their creditors. *In re Goff*, 706 F.2d at 577; *In re Graham*, 726 F.2d at 1269; and *In re Daniel*, 771 F.2d at 1354. Thus, as illustrated above, the exemption for property such as Social Security benefits and Veterans' benefits provides no analogy for excluding or exempting ERISA pension benefits. The contrast in statutory language, as well as the legislative history cited above, indicate that Congress intended otherwise.

Likewise, the debtor mistakenly calls upon the Internal Revenue Code and the Internal Revenue Service for the creation of a separate federal exemption for ERISA benefits independent of the Bankruptcy Code. The extreme minority view advocated by the debtor fails to take proper account of the relationship between ERISA's

labor law provisions and its Internal Revenue Code provisions. ERISA's anti-alienation and anti-assignment provisions are codified at 29 U.S.C. § 1056(d)(1) [labor] and 26 U.S.C. § 401(a)(13) [Internal Revenue Code], *reprinted in* Cross-Petition for Certiorari, Appendix A, at 2a-4a. The plain language of ERISA's anti-assignment and anti-alienation provisions applies only to the requisite content of ERISA plans for favorable tax treatment. The language of these provisions creates no exemption. Likewise, the Department of Treasury has issued no regulations concerning ERISA's anti-assignment or anti-alienation provisions except as to the requisite content of ERISA plans for favorable tax treatment. Any contrary treasury regulation would run afoul of ERISA's declaration that it does not serve to "modify, invalidate, impair, or supersede" the provisions of other federal laws, 29 U.S.C. § 1144(d), and obviously would run afoul of Bankruptcy Code § 541(a). The Department of Treasury lacks any authority to issue a regulation that would "modify, invalidate, impair, or supersede" the provisions of other federal laws.

Respecting ERISA plans, the IRS' capability goes no further than the tax qualification of such plans. The tax qualification of ERISA deals with amendments or additions to the Internal Revenue Code which impose the requirements that a plan must meet in order to provide the tax advantages and benefits of a qualified plan. Title I of ERISA contains its labor law provisions. The preemption provisions of ERISA are set forth at ERISA § 514(a) [29 U.S.C. § 1144(a)] as part of the labor law provisions of ERISA in Title I. Conversely, the tax provisions of Title II

of ERISA are not encompassed by the preemption provision contained in Title I of ERISA. *Compare* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title I – Protection of Employee Benefit Rights, §§ 1-514, 88 Stat. 832-97, *with id.*, Title II – Amendments to the Internal Revenue Code Relating to Retirement Plans, secs. 1001-2007, 88 Stat. 898-994. The language of ERISA § 514(a) as enacted makes it clear that the preemptive scope of ERISA extends only to Titles I and IV ("Plan Termination Insurance") of ERISA:

> Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title [Title I] and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. . . .

ERISA § 514(a), Pub. L. No. 93-406, 88 Stat. 832, 897. The omission of any reference in this section to Title II of ERISA ("Amendments to the Internal Revenue Code Relating to Retirement Plans") clearly indicates Congress' intent that the preemptive scope of ERISA pertains only to its labor law provisions and not its tax provisions.[1]

---

[1] "Title I of ERISA, Pub. L. No. 93-406, 88 Stat. 829 (codified at title 29 of the United States Code), embodies the labor law provisions of ERISA governing, inter alia, reporting and disclosure, participation and vesting, funding, fiduciary responsibility, and administration and enforcement. Title II of ERISA, Pub. L. No. 93-406 (codified in various sections of Title 26 of the United States Code), deals with amendments or

(Continued on following page)

Regardless, the IRS could hardly regulate or rule away ERISA's prescription that its provisions shall not "be construed to alter, amend, modify, invalidate, impair or supersede" other federal laws such as Bankruptcy Code § 541(a). 29 U.S.C. § 1144(d). Moreover, any contrary private rulings of the IRS are not binding on this Court and may not be used or cited as precedent. 26 U.S.C. § 6110(j)(3); *Fogler v. Flindall (In re Flindall)*, 105 B.R. 32, 41 (Bankr. D. Ariz. 1989).

Contrary to the debtor's assertions, neither *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), nor *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 395 (1990), recognizes ERISA as a federal exemption statute. The Court in *Mackey* simply held that ERISA preempts "any and all *State* laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 486 U.S. at 829 (emphasis added). The Court in *Guidry* simply held that ERISA's anti-alienation provision is not subject to the remedial provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) because giving precedent to ERISA would not modify, impair, or supersede the LMRDA. 493 U.S. at 374-75. Neither of these cases arose in the bankruptcy context, and neither involved the situation where, as here, recognizing the ERISA anti-alienation provision as a

---

(Continued from previous page)

additions to the Internal Revenue Code which impose requirements a plan must meet in order to provide the tax advantages and benefits of a qualified plan. The provisions of title II of ERISA are not embodied within the preemptive scope of ERISA § 514(a) (29 U.S.C.A. § 1144(a) (West 1985)). . . . " *In re Martin*, 102 B.R. 639, 643 n.11 (Bankr. E.D. Tenn. 1989).

federal exemption would modify, impair, or supersede sections 541(a) and 522(d)(10)(E) of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be denied.

March 11, 1992.

Respectfully submitted,

JOHN F. WEAVER
Counsel for Cross-Respondent

McCORD, WEAVER & TROUTMAN, P.C.
Suite 1300, Plaza Tower
Post Office Box 2046
Knoxville, TN 37901
615-637-5252